Supreme Court, U.S.
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No. 03-1594

IN THE

Supreme Court of the United States

RICHARD J. ANGELICO, M.D.,

Petitioner,

v.

LEHIGH VALLEY HOSPITAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner properly preserved his argument as to whether the Trial Court may withhold from jury consideration the factual basis for immunity under the Health Care Quality Improvement Act and thus appropriately present it for review by this Court?

2. Whether there is any conflict between the Courts of Appeal as to whether immunity under the Health Care Quality Improvement Act is an issue of law to be determined by the Court?

3. Whether the Trial Court was within its authority to grant a post trial motion for immunity under the Health Care Quality Improvement Act?

4. Whether there is an issue as to whether the Health Care Quality Improvement Act affords "immunity from suit"?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Lehigh Valley Hospital, Inc., is wholly owned by Lehigh Valley Health Network.

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Fed. R. Civ. P. 60 3

COUNTER-STATEMENT OF THE CASE

Procedural History

In April of 1996, Petitioner Richard J. Angelico, M.D. ("Dr. Angelico") filed the Complaint in this matter, in which he claimed that the various defendants, three hospitals, Lehigh Valley Hospital, St. Luke's Hospital and Easton Hospital, and two groups of cardiothoracic physicians, conspired to keep him out of the market for cardiothoracic surgery in the Lehigh Valley in violation of sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. Dr. Angelico also brought, under the doctrine of pendent jurisdiction, state law claims against defendant, Lehigh Valley Hospital, for breach of contract, and against defendant, St. Luke's Hospital, for breach of contract and tortuous interference with existing or prospective contractual relations.

Additionally, the same Complaint also brought antitrust claims and § 1983 due process claims against defendant, Brian Peters, Esquire and his law firm, Post & Schell, P.C. (§ 1983 claims were also brought against Lehigh Valley Hospital). After filing of a motion to dismiss, by Post & Schell, the antitrust counts were voluntarily dismissed by Angelico. On September 13, 1996, the Court sanctioned Petitioner's counsel for bringing these counts against Peters and Post & Schell and necessitating the filing of a motion before withdrawal. The § 1983 claim against Lehigh Valley Hospital was also dismissed because it depended for any viability on the existence of a claim versus Post & Schell. No appeal, involving these issues, was taken.

Following completion of discovery[1] regarding the threshold issues of antitrust standing and antitrust injury, defendants jointly filed a motion for summary judgment on Dr. Angelico's antitrust claims based on his failure to produce sufficient evidence of antitrust standing or injury to competition. On October 31, 1997, the district court entered summary judgment for defendants on Dr. Angelico's antitrust claims and declined to exercise supplemental jurisdiction over his state law claims. *Angelico v. Lehigh Valley Hosp., Inc.*, 984 F. Supp. 308 (E.D. Pa. 1997).

Dr. Angelico appealed the district court's ruling to the Third Circuit Court, which reversed the district court's ruling on the issue of standing and remanded to the district court for further proceedings. *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268 (3d Cir. 1999).

On remand, the district court re-opened discovery, permitting full discovery on all issues. Plaintiff availed himself of this discovery fully. Following the close of discovery, defendants again moved both jointly and individually, for summary judgment, on the anti-trust and state law claims. Lehigh Valley Hospital also moved for a grant of immunity under the Health Care Quality Improvement Act (H.C.Q.I.A.). The other two hospital defendants had not rejected Dr. Angelico's application under the provisions of the H.C.Q.I.A. The district court denied these motions, and the case proceeded to trial before a jury.

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1. Discovery was limited only to the issues of antitrust standing, injury and geographic and product markets, pursuant to a limited discovery order issued by the Court.

Following a six week jury trial in February and March of 2001 before the Honorable J. Curtis Joyner, the jury returned a defense verdict on all counts, including the pendent state law claims.[2] Dr. Angelico filed a post-trial motion seeking relief from the trial court pursuant to Fed. R. Civ. P. 59 and 60.[3] These Motions were denied.

Lehigh Valley Hospital also renewed its motion for a grant of immunity under the H.C.Q.I.A. Lehigh Valley Hospital's Motion for immunity was granted. Petitioner Dr. Angelico then filed an appeal to the Third Circuit. The anti-trust and state law claims were not pursued on the appeal.

Judgment was fully affirmed by the Third Circuit Court of Appeals and Petitioner's request for a rehearing was denied.

The instant Petition for Writ of Certiorari followed.

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2. Both at the close of Dr. Angelico's case and again at the close of trial each defendant moved for Judgment as a Matter of Law. Lehigh Valley Hospital renewed its Motions for an immunity determination (N.T. 3/2/01 at 180-215, Appendix at C155-C190; N.T. 3/13/01 at 213-235, Appendix at C210-C232). The court denied these motions pending the jury's verdict. (N.T. 3/2/01 at 215, Appendix at C190; N.T. 3/13/01 at 235, Appendix at C232). These are references to the Reproduced Record filed with the Third Circuit Court of Appeals.

3. Dr. Angelico's trial counsel withdrew from their representation of him following trial. Consequently, Dr. Angelico pursued his motion for post-trial relief, the appeal, and the present Petition for Writ of Certiorari, Pro Se.

Factual History

Plaintiff was a cardiothoracic surgeon. In 1986, Dr. Angelico was looking for work in his specialty of open heart surgery. He wished to become a Medical Staff member at Lehigh Valley Hospital. (T.T. Angelico, February 8, 2001, p. 187 lines 10-22, App. A at 0001-0002). At that time, Lehigh Valley Hospital had a Quality Assurance/Medical and Allied Health Staff Development Plan. That Plan established a limited number of "manpower slots" within particular Hospital departments, including the Department of Cardiothoracic Surgery. To acquire staff privileges, there must be an available "manpower slot". (T.T. Hart, February 16, 2001, p. 10 line 15 through p. 12 line 8, App. A at 0003-0006). When Dr. Angelico started at Lehigh Valley Hospital, there was no "manpower slot" available for him. However, there were "manpower slots" held by groups. One of those groups, which he joined, was the "Khindri" Group. Dr. Angelico thus fit under that group's "manpower slot". Dr. Angelico then left Dr. Khindri and joined another group, Panebianco-Yip, (P.Y.) and was covered under their manpower slot. (T.T. Hart, February 16, 2001, p. 13 lines 7-17, App. A at 0007-0008). That group sent him to St. Luke's Hospital to establish the group at a separate hospital. Thereafter, he was devoting himself full time to St. Luke's Hospital's patients. When, he had built up a practice at St. Luke's Hospital, he left the group that had sent him to establish the group's practice at St. Luke's Hospital. He then maintained a solo practice at St. Luke's Hospital. (T.T. Angelico, February 8, 2001, p. 195 lines 13-20, App. A at 0009-0010). Thereafter, Dr. Angelico admitted heart patients exclusively to St. Luke's Hospital. In January 1991, Dr. Angelico voluntarily requested that his active staff privileges at Lehigh Valley Hospital be reduced to courtesy privileges, which only allow for twelve (12) patient admissions and/or consults, because of his "busy" practice at St. Luke's Hospital. The request was granted.

Dr. Angelico didn't utilize his new courtesy privileges, and did not admit patients at Lehigh Valley Hospital after 1989. (T.T. Angelico, February 12, 2001, p. 147 lines 2-5, App. A at 0011-0012).

Then, after several years, and after he had developed a thriving practice exclusively at St. Luke's Hospital, Dr. Angelico suddenly resigned from the only hospital at which he was practicing his profession. He resigned in March of 1994. (T.T. Angelico, February 9, 2001, p. 35 lines 9-15, App. A at 0013-0014). It was highly unusual for a doctor of any specialty to suddenly announce a resignation and simply walk away.

As of his resignation from St. Luke's, there were no open manpower slots at Lehigh Valley Hospital., for active privileges in cardio thoracic surgery. (T.T. Hart, February 16, 2001, p. 59 lines 9-22, App. A at 0015-0016) and (T.T. Hart, February 20, 2001, p. 45 lines 10-17, App. A at 0017-0018).

Dr. Angelico sought privileges at Easton hospital, but did not receive them. He also attempted to return to St. Luke's but was unsuccessful.

In September of 1994 Dr. Angelico and Dr. Toonder, a cardiothoracic surgeon at Lehigh Valley Hospital, agreed to form a partnership in order to obtain privileges for Dr. Angelico under a manpower slot held by Toonder at Lehigh Valley Hospital (T.T. Hart, February 20, 2001, p. 98 lines 8-24, App. A at 0019-0020).

In October 1994 Dr. Angelico was deemed to have voluntarily relinquished his courtesy staff privileges at Lehigh Valley Hospital by reason of failing to make timely payment

of his medical staff dues. (Plaintiff's Trial Exhibit 41, App. A at 0021-0027). At trial, Lehigh Valley Hospital presented evidence and testimony that Plaintiff received the required first notice of dues and that the second notice was sent ten days before the final due date. (T.T. Hart, February 16, 2001, p. 77 line 9 through p. 83 line 23 , App. A at 0028-0035). Plaintiff admitted he failed to pay his dues when required. (T.T. Angelico, February 12, 2001, p. 93 lines 5-25, App A at 0036-0037). He did try by pre-dating a check within the time limits to avoid his failure, but fortunately, Lehigh Valley Hospital retained the envelope that the check was mailed in.

On November 6, 1994 Dr. Angelico submitted an application to Lehigh Valley Hospital for staff privileges in order to receive the manpower slot which Toonder had been granted. (Plaintiff's Trial Exhibit 43, App. A at 0038-0049). This application triggered the responsibility of the hospital to do its "due diligence" to discover what Dr. Angelico's practice had been since he began working exclusively full time at St. Luke's Hospital.

As part of due diligence, John W. Hart, Vice President for LVH, submitted a letter dated November 10, 1994 to Charles Sanders, Vice President for Medical and Academic Affairs at St. Luke's Hospital, since 1989, St. Luke's Hospital was the only place he had practiced. (Plaintiff's Trial Exhibit 45, App. A at 0050-0051). It is standard procedure to get information of an applicant's most recent job experiences. Both Lehigh Valley Hospital and St. Luke's are avid and active competitors and neither hospital likes the other.

The letter contained a detailed questionnaire. While Dr. Sanders answered the questions in a non-suspicious nature, he then added the following cryptic comment: " *Dr. Angelico resigned from our staff. Only he can provide the reasons for*

his resignation." (*Id.*, emphasis added). This addition, by Sanders raised legitimate concerns.

Thereafter a series of correspondence was instituted by Mr. Hart, between himself, Dr. Saunders and Dr. Angelico, due to the paradoxical nature of St. Luke's Hospital response. This correspondence sought more complete information concerning the reasons for Dr. Angelico's resignation. The question of why the resignation occurred never gets answered satisfactorily. (Exhibits 47, 48, 49, 52, 54, 55, 56, 57, 59, 60, see App. A at 0052-0065).

Lehigh Valley Hospital was attempting to unravel this puzzle, because successful people don't just jump ship without some cause. As has been said "where there is smoke there is fire".[4]

Then on March 18, 1995, Toonder, Dr. Angelico's partner, filed a Petition to Enforce a Settlement Agreement and for Other Equitable Relief, in State Court, asserting Lehigh Valley Hospital was wrongfully refusing to honor the terms of a Settlement Agreement. Toonder demanded, in light of Lehigh Valley Hospital's alleged "delay in reviewing Dr. Angelico's Application," that the Equity Court order Lehigh Valley Hospital to fully and fairly review and act upon the credentials of Dr. Angelico. . . ." *Toonder v. Lehigh Valley Hospital*, 1995 WL 870769, 26 Pa. D&C 4th 488 (1995), *affirmed* 701 A.2d 791 (Pa. Super. 1997).

On March 21, 1995, Mr. Hart, because the hospital was acting in good faith, despite Toonder's allegations, and still not having any satisfactory explanation from either

4. Loosely quoted from John Heywood's proverbs.

Dr. Sanders or Dr. Angelico, considered Plaintiff's application for full staff privileges to be as complete as possible under the circumstances. The application, despite the flaws, was submitted to the Credentialing Committee in April of 1995. (T.T. Hart, February 16, 2001, p. 155 lines 2-22, App A at 0067-0068). Credentialing is the first committee that considers the application. Approval by this committee does not grant privileges, it merely moves the application to the next stage, therefore, there was still an opportunity to find out what really happened at St. Luke's.

In April of 1995, Credentialing, based upon the then available information, approved Dr. Angelico's application for full staff privileges. It was then to be submitted to the Medical Executive Committee, which was meeting in May of 1995. (T.T. Hart, February 16, 2001, pp. 157 lines 7-21, App. A at 0069-0070).

During the intervening time period between the conclusion of the preliminary injunction hearings in State Court on April 18th and 19th of 1995, and the final hearing scheduled for July 5, 1995, in the *Toonder* matter, counsel for Lehigh Valley Hospital issued several deposition subpoenas to witnesses from St. Luke's Hospital to find out what Dr. Angelico's actual record was at that hospital. The witnesses were ordered to bring with them to the depositions a large variety of documentation concerning Dr. Angelico. The witnesses subpoenaed to these depositions were all associated with Dr. Angelico at St. Luke's Hospital. They included the Chairman and Chief of the Department of Surgery at St. Luke's Hospital (Plaintiff's Trial Exhibit 67, App. A at 0071-0074); the Vice President of Medical/ Academic Affairs for St. Luke's Hospital (Plaintiff's Trial Exhibit 66, App. A at 0075-0078); the Vice President of

Patient Care Services at St. Luke's Hospital (Plaintiff's Trial Exhibit 69, App. A at 0079-0081); and two perfusionists[5], one of whom was the Chief Perfusionist at St. Luke's Hospital and the other perfusionist was associated with Dr. Angelico's, "one incident". (Plaintiff's Trial Exhibit 68, App. A at 0082-0084)[6].

St. Luke's Hospital did not voluntarily comply. Their lawyers fought bitterly against the production, and objected to the depositions. Nevertheless, the Court overruled most of their objections and material was produced and depositions were taken. (T.T. Angelico, February 12, 2001, p. 25 line 3 through p. 27 line 17 App. A at 0085-0088).

Dr. Angelico reviewed all of the subpoenaed documents at St. Luke's Hospital *before* Lehigh Valley Hospital ever saw them. He also attended the depositions of all five witnesses. He assisted counsel in the cross-examination of the witnesses.

This information obtained through discovery, referred to incidents involving nurses and technicians; dating back to March of 1988. It demonstrated that Dr. Angelico had been rude, abusive and insensitive. This well documented history of Dr. Angelico's disruptive behavior at St. Luke's Hospital, none of which was disclosed before discovery, amply justified

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5. In open heart surgery, the heart lung machine is used to by-pass the heart while the heart is stopped for the necessary repairs. The operators of the machine, who are an integral part of the surgical team, are called "perfusionists."

6. The Chief of Surgery, the Chief Perfusionist, the Vice President of Medical Affairs, all were called as witnesses at the federal trial.

Lehigh Valley Hospital's cautious, careful and prudent treatment of Dr. Angelico's Application[7].

Before acting upon the information in documents which it obtained in response to the deposition subpoenas, Dr. Angelico was given the opportunity to refute the information contained in the documents. Dr. Angelico availed himself of the opportunity and wrote an extensive response. Thereafter, that response was provided by Dr. Angelico in a letter to Dr. John Castaldo, President of Lehigh Valley Hospital Medical Staff. It attempted a rebuttal of St. Luke's Hospital's information (Plaintiff's Trial Exhibit 74, App. A at 0089-0095), Lehigh Valley Hospital's Medical Executive Committee used the depositions and the reply letter in evaluating the information. Based on this information, the Executive Committee voted to recommend denial of Dr. Angelico's application for staff privileges in June of 1995.

Jumping ahead several steps (Plaintiff's Trial Exhibit 74), Dr. Angelico's response was used at the anti-trust and contract claim trial, and this exhibit in Plaintiff's own words clearly indicated that he was a disruptive physician. Plaintiff called one of the Executive Committee Members, Susan Wiley, M.D., and her testimony on Plaintiff's side of the case, gave the jury a clear picture of why a hospital did not need such a physician on its staff. Disruptive physicians have no place in the modern team oriented hospitals.

Subsequently, Dr. Angelico requested and received a Fair Hearing under the Lehigh Valley Hospital Medical Staff

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7. At the District Court trial, the Chief Perfusionist referred to events in the operating room as like being part of a reign of terror on Dr. Angelico's part. Other witnesses at the trial also testified along those lines.

Bylaws. The Hearing was requested by Dr. Angelico on June 30, 1995. (Plaintiff's Trial Exhibit 86, App. A at 0096). The appeal hearing was originally scheduled for August 31, 1995, which was two days beyond the sixty (60) days required by the Bylaws. This delay was due in large part to the inability to coordinate the schedules of those members on the appeal hearing panel with those of Plaintiff's three attorneys. However, it is undisputed that Plaintiff was given the opportunity to have his hearing on August 28 and 29, within the sixty (60) day requirement, but he declined to avail himself of these dates. The Fair Hearing subsequently commenced on September 5, 1995, a mere five (5) days later. (Plaintiff's Trial Exhibits 92, 93, 94, 95, 96, 98, App. A at 0097-0107).

Pursuant to the Bylaws (Section II E. 1(c)(2) p. 49, Plaintiff's Trial Exhibit 2, App. A at 0108-0185) Dr. Angelico had the right to object to the composition of the Hearing Panel, and was so apprized of that right when he was notified of the composition of the Hearing Panel and his right to object in a letter dated July 19, 1995 (Plaintiff's Trial Exhibit 87, App. A at 0186-0187). Neither Dr. Angelico nor his attorneys made any objection to the members of the Hearing Panel. Objection will first be made at the trial in District Court and it is repeated in this appeal.

After a lengthy hearing process, taking five (5) nights to complete, (Lehigh Valley Hospital Trial Exhibit 34 A-E, App. A at 0188-0434), the Fair Hearing Panel recommended the denial of Dr. Angelico's application for medical staff privileges on February 6, 1996 (Plaintiff's Trial Exhibit 101, App. A at 0435-0466), and issued a well reasoned report.

Dr. Angelico appealed this decision to the Appellate Review Committee of the Board of Trustees, under Bylaws Section IIIA.1.

Before the Board of Trustees had an opportunity to act, Dr. Angelico brought this Antitrust and related State Claims Action. He also filed a separate State Court Action. (Plaintiff's Trial Exhibit 103, App. A at 0467-0473). On May 14, 1996, the Appellate Review Committee upheld the decision of the Fair Hearing Committee.

Dr. Angelico appealed this decision to the Board of Trustees of Lehigh Valley Hospital. On June 5, 1996, the Board of Trustees of Lehigh Valley Hospital voted to reject the application of Dr. Angelico. (Plaintiff's Trial Exhibit 105, App. A at 0474-0475). After the denial of Dr. Angelico's application for medical staff privileges, Lehigh Valley Hospital, as is required by the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112, *et seq.*, (App. A at 0490) made a report to the National Practitioner's Data Bank. (Plaintiff's Trial Exhibit 108, App. A at 0476-0479).

At the District Court trial, no Member of the Board of Trustees was called. No attempt was made to rebut the presumptions given to the Board of Trustees under the Health Care Quality Improvement Act of having acted fairly.

REASONS FOR DENYING THE PETITION

1. Petitioner did not preserve his argument that the Trial Court cannot withhold from jury consideration the factual basis for the grant of immunity under the Health Care Quality Improvement Act.

The Petition for Writ of Certiorari in this case sets forth the following question, "may a District Court properly withhold from jury consideration whether or not a data bank entry was properly determined by a peer-review process and then subsequent to trial, decide the issue by granting the peer-review body immunity under the Health Care Quality Improvement Act on a post-trial motion?" The only issue related to the grant of immunity presented to the Third Circuit Court of Appeals was "whether the District Court's grant of immunity under the Health Care Quality Improvement Act, despite the failure of Lehigh Valley Hospital to comply with the fairness standards set forth in § 11112(a) of that Act and the requirements of adequate notice and conduct of hearing set forth in § 11112(b), represents a manifest error of law." Petitioner did not previously raise the issue he is now raising before this Court. Like the Petitioner in *Adams v. Robertson*, 520 U.S. 83 (1997), the Petitioner in the case at bar has failed to carry his burden of showing that the claims he raises here were properly presented to the Court below. Accordingly, under the reasoning set forth by this Court in *Adams*, *supra*, his petition for Writ of Certiorari must be dismissed.

2. There is no conflict between the Courts of Appeal as to the question of whether immunity under the Health Care Quality Improvement Act is an issue at law to be determined by the Court.

In the case at bar, the District Court granted a motion for immunity under the Health Care Quality Improvement Act in a post-trial motion. There is no legal authority in any of the circuits that stands for the proposition that the trial court cannot do this.

Petitioner, in his attempt to have his Writ of Certiorari approved by this Court, argues that there is conflict among the appeal courts as to whether a court in a post-summary judgment situation has the authority to rule on the immunity question. In support of this argument, the Petitioner cites *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25 (2002). The petitioner seems to be arguing that *Singh* stands for the proposition that the jury has a right to determine whether a factual basis exists for grant of immunity under the Health Care Quality Improvement Act. *Singh* does not stand for any such proposition. Rather, *Singh* is consistent with all other appellate courts in recognizing that defendant's motions for summary judgment based on immunity under the Health Care Quality Improvement Act, can be determined on a motion for summary judgment. In fact, the First Circuit held in this case that a summary judgment on the basis of immunity under the Health Care Quality Improvement Act did not deprive the plaintiff-physician of his seventh amendment right to a jury trial. What Petitioner fails to appreciate is that *Singh* stands for the proposition that the statutory scheme for immunity under the Health Care Quality Improvement Act only contemplates a role for a jury in an appropriate case, i.e., a factual dispute exists. *Singh* states

that the health care quality immunity determinations *may* be resolved by a jury, not that they must be resolved by a jury simply because it cannot be resolved at the summary judgment stage.

There is no conflict among the courts of appeal in respect to whether a court may, as a matter of law, grant immunity under the Health Care Quality Improvement Act. The courts have uniformly recognized the presumption that exists for immunity and that in order to rebut the presumption, a court asks whether a reasonable jury, viewing all facts in a light most favorable to [the plaintiff], could conclude that he had shown, by a preponderance of the evidence, that [the health care entities] actions fell outside the scope of § 11112(a). *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 912 (8th Cir. 1999); *Brader v. Allegheny General Hospital*, 167 F.3d 832, 839 (3d Cir. 1999); *Brown v. Presbyterian Health Care Services*, 101 F.3d 1324, 1334 n.9 (10th Cir. 1996).

There is no conflict between the Courts of Appeal for the United States Supreme Court to consider and, consistent with the approach taken by all the Appeals Courts, the District Court acted within its authority to grant immunity under the Health Care Quality Improvement Act.

3. The District Court was within its authority to grant a post-trial motion for a finding of immunity under the Health Care Quality Improvement Act.

The issue of immunity under the Health Care Quality Improvement Act is one of law for the Court to decide, in a motion for either summary judgment, for a directed verdict, or for a judgment post-trial, "*whenever the record in a particular case becomes sufficiently developed*", and that

while disputed subsidiary issues of fact pertinent to the immunity might be given to the jury on special interrogatories, "[u]nder no circumstances should the ultimate issue [of Health Care Quality Act Immunity] be submitted to the jury." *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332-1333 (11th Cir. 1994). (emphasis added). The District Court chose to render its determination on the immunity question post-trial. Dr. Angelico had more of an opportunity to develop a record favorable to himself than in any of the other cases in this area which are all decided pre trial.

Clearly, the Petitioner cannot argue that the record in the case had not been sufficiently developed. Petitioner was afforded the opportunity to present his case (much of which he tries to reargue in his Writ of Certiorari) during the course of a six-week jury trial which ultimately led to a defense verdict for all Defendants. In his argument that the District Court was in error in not giving to the jury the question of immunity, he fails to consider the very reason for a jury's role as fact-finder. That is, there must be a genuine issue as to a material fact on the elements of a claim. That is, this articulated basis generally held to support a motion for summary judgment is analogous to the posed question of "whether a reasonable jury, viewing all the facts in a light most favorable to the plaintiff, could conclude that he has shown, by a preponderance of evidence that the defendant's actions fell outside the scope of § 11112(a)?" *Singh* at 33. In the case at bar, there is no factual dispute. Rather, in reviewing Petitioner's argument, you will note that the Petitioner is really objecting to the District Court's legal conclusion that the facts presented through the course of a six-week trial by the Petitioner was insufficient to rebut the presumption of immunity afforded to Defendant Lehigh

Valley Hospital by 42 U.S.C. § 11112(a). There are no genuine issues of fact. For example, there is no dispute as to when a medical staff fair hearing occurred. There is no dispute factually as to who provided testimony during the Petitioner's medical staff fair hearing. Rather, there is a question of law as to whether the deposition transcripts reviewed by the fair hearing should be characterized as witnesses or as documents. The Court found them to be documents. This is a legal, not a factual determination, and one rightly for the Court to make. There is no genuine issue of fact cited by the Petitioner in his Writ of Certiorari that could go to a jury. Using the objective standard as to whether the hospital had followed the provisions of § 11112(a), it is clear that Plaintiff has not re-butted the presumption against him.

4. There is no issue as to whether the Health Care Quality Improvement Act affords "immunity from suit".

Petitioner's final question presented in his Writ of Certiorari for consideration is whether the Court below erred in affirming the District Court's Order declaring Lehigh Valley Hospital immune from suit. It is respectfully submitted that Petitioner simply engaged in a game of semantics and that the District Court's ruling does not suggest that it had fundamentally ignored legal principles otherwise uniformly held, that is, that Health Care Quality Improvement Act's statutory provisions only provide for immunity from money damages. 42 U.S.C. § 11111. The law is clear on this point and it is respectfully submitted that Petitioner simply seeks to create a phantom issue for this Court to consider. There is not, and never has been, any claim for equitable or injunctive relief by Plaintiff. His claim has always been for money damages, trebled in the anti-trust area.

CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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